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# IN THE COURT OF APPEALS OF INDIANA

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| HOWARD SLUSHER, | ) | |
| | ) | |
| Appellant-Respondent, | ) | |
| | ) | |
| vs. | ) | No. 34A02-0712-CV-1143 |
| | ) | |
| ELIZABETH (SLUSHER) ROGERS, | ) | |
| | ) | |
| Appellee-Petitioner. | ) | |

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable William C. Menges, Judge
Cause No. 34D01-0409-DR-859

**May 30, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Howard Slusher ("Father") appeals the trial court's order modifying child support. He raises three issues, which we restate as

I. Whether the trial court erred when it failed to give Father a credit on child support due to his duty to support a prior born child;

II. Whether the trial court erred when it improperly imputed income to Elizabeth (Slusher) Rogers ("Mother"); and

III. Whether the trial court incorrectly calculated the uncovered medical expenses owed by Father.

We vacate and remand.

## FACTS AND PROCEDURAL HISTORY

Following the divorce of Father and Mother in October 1993, Mother was awarded custody of the parties' four children, and Father was ordered to pay child support for the four children. Father is also the father of a child born prior to the four children he had with Mother. This child is sixteen years old and resides with Father. No child support order has been entered for this prior-born child, and Father receives no support from the Mother of said child.

On February 25, 2004, an Agreed Entry was submitted by the parties and accepted by the trial court. In it, the parties agreed that Mother's current husband "shall keep the children insured for health/accident incidents through said husband's employer." *Appellee's App*. at 33. Mother was to be responsible for the first $586.56 of annual uninsured medical/dental/orthodontia and optical costs ("medical costs") for the children, and the parties would share the additional costs with Father paying 75% and Mother paying 25%. *Id*. Pursuant to a subsequent modification of support, Father's support amount was modified, and

as to medical costs, Mother was ordered to pay the first $646.00 in annual uninsured medical costs, with Father being responsible for 62% and Mother for 38% of any further costs. *Appellant's App*. at 39-42. This order was made retroactive to September 3, 2004. Mother filed the petition for modification at issue here on May 10, 2007.

At the time of Mother's petition, Father was employed at Menard's in Kokomo, Indiana and had a gross weekly income of $458.00 per week. Mother was unemployed. She had previously been employed at Delphi Electronics, earning $14.00 per hour. She voluntarily left that job in order to be at home to supervise the parties' oldest child and make sure he attended school.

A hearing was held on Mother's petition on September 24, 2007, and the trial court issued its order modifying child support on the same day. In its order, the trial court modified Father's support amount to $140.00 per week, retroactive to May 11, 2007. In calculating this amount, the trial court did not give Father a credit for a legal duty to a prior-born child and imputed income to Mother in the amount of $234.00 per week, which was calculated using minimum wage for a forty-hour workweek. The trial court also found Father to be in arrearage for $6,731.04 in unpaid medical costs. Father now appeals.

## DISCUSSION AND DECISION

Generally, decisions regarding child support rest within the sound discretion of the trial court. *Painter v. Painter*, 773 N.E.2d 281, 282 (Ind. Ct. App. 2002). We will reverse a trial court's decision in child support matters only for an abuse of discretion or if the trial court's decision is contrary to law. *Id*. An abuse of discretion occurs when the trial court's

decision is against the logic and effect of the facts and circumstances before it. *Burke v. Burke*, 809 N.E.2d 896, 898 (Ind. Ct. App. 2004).

## I. Child Support Credit

Father argues that the trial court erred when it failed to give him a credit in the calculation of child support due to his support obligations for his prior-born child. Pursuant to Indiana Child Support Guideline 3(C), after the weekly gross income is determined for each parent, certain reductions are allowed in computing the weekly adjusted income, which is the amount on which child support is based. Ind. Child Support Guideline 3(C). These reductions include court orders for support of prior-born children and a legal duty of support of prior-born children. *Id*.

"Where a party has a legal support duty for children born prior to the child(ren) for whom support is being established, not by court order, an amount reasonably necessary for such support shall be deducted from weekly gross income to arrive at weekly adjusted income." Child Supp. G. 3(C)(2). This is true even though the obligation has not been reduced to a court order. Child Supp. G. 3(C), cmt. 2. "A custodial parent should be permitted to deduct his or her portion of the support obligation for prior-born children living in his or her home." *Id*. It is recommended that the Child Support Guidelines be used to compute support. *Id*.

Here, Father testified that he has a prior-born child who resides with him. *Tr*. at 45. Although Father indicated that there was no current support order at the time of the hearing, he was attempting to locate the child's mother to have support ordered from her. *Id*. Father submitted a child support worksheet to reflect what his support obligation for his prior-born

child should be. *Appellant's App*. at 49. He used his weekly gross income from Menard's at $458.00 and imputed an income to the mother at minimum wage. *Id*. Pursuant to that worksheet, the total support obligation was $115.00 per week, and Father's proportionate share of this obligation was $75.89 per week for his prior-born child. *Id*.

Based on the evidence in the record before us, we conclude that the trial court erred in failing to allow Father a credit for his legal duty to support his prior-born child.[1] The undisputed evidence presented established that Father had a prior-born child who resided with him. The evidence also demonstrated that Father was the sole supporter of this child, as he could not locate the mother and was in the process of attempting to obtain support from her. Although Mother argues that no evidence was presented to establish the amount of funds Father has paid to support his prior-born child, Comment 2 to Indiana Child Support Guideline 3(C) states that "[i]t is recommended that these guidelines be used to compute support." Child Supp. G. 3(C), cmt. 2. Therefore, Father's submitted worksheet, which utilized the guidelines to reach its amounts, was the proper way to compute his support requirement for his prior-born child. We remand to the trial court to determine a proper credit on Father's behalf as to his legal duty to support his prior-born child.

## II. Imputed Income

[1] We also note that the trial court has previously given a credit to Father for his prior-born child in past modification orders. In the trial court's prepared child support obligation worksheet, attached to its April 11, 2005 order modifying child support, the trial court included a deduction in the amount of $75.00 for the legal duty for prior-born child.

Father contends that the trial court improperly determined a child support amount when it imputed income in the incorrect amount to Mother. Father argues that Mother voluntarily left her employment at Delphi Electronics, where she was making $14.00 per hour, and this was the amount that should have been used to determine her potential income in order to determine child support.

"If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income." Child Supp. G. 3(A)(3). Potential income shall be determined using employment potential and probable earnings level based on the obligor's work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community. *Id*. If there is no work history and no higher education or vocational training, then weekly gross income may be set at least at the federal minimum wage level. *Id*. "[D]iscretion must be exercised on an individual case basis to determine if it is fair under the circumstances to attribute potential income to a particular nonworking or underemployed custodial parent." Child Supp. G. 3(A), cmt. 2(c). "The need for a custodial parent to contribute to the financial support of a child must be carefully balanced against the need for the parent's full-time presence in the home." *Id*.

Here, the evidence presented demonstrated that Mother had previously been employed at Delphi Electronics, making $14.00 per hour. She voluntarily left this job to be at home to supervise the parties' oldest child and make sure he attended school and did the things he was "supposed to do." *Tr*. at 27-28, 29-30. In the child support calculation attached to its order, the trial court imputed $234.00 in weekly gross income to Mother, which is income calculated at the federal minimum wage level. *Appellant's App*. at 18.

We conclude that the trial court erred in imputing income to Mother in the amount of $234.00 per week. Because the trial court made no findings, we are unable to determine if the trial court implicitly credited Mother's need to stay home to supervise the parties' child and found it to be a proper reason for Mother to quit her job, thereby justifying her unemployment and making her involuntarily unemployed. We remand to the trial court for an explicit determination as to whether Mother was voluntarily unemployed, and if so, for a proper calculation of imputed income. To the extent that Mother has a work history, the trial court should calculate any imputed income at the level she was paid at her previous employment. Additionally, to the extent that the trial court deems Mother's reason for quitting her employment to be proper, her imputed income should be calculated by reducing the amount of hours paid per week and not the amount paid per hour, as her reason for being unemployed does not obviate her ability to work completely, but instead reduces the hours she can work per week.

## III. Uninsured Medical Costs

Father argues that the trial court incorrectly calculated the amount of unpaid medical costs he owed to Mother. He contends that the trial court ordered him to pay the incorrect percentage of these unpaid medical costs because the court ordered him to pay 75% of the total amount of the unpaid medical costs. He claims that this is incorrect because the April 11, 2005 order, which modified support, stated that Mother was to be responsible for the first $646.00 in annual uninsured medical costs, and thereafter, Father would be responsible for 62% and Mother 38% of such costs. Additionally, Mother argues that the trial court incorrectly calculated the uninsured medical costs owed by Father because she claims that

she should have received credit and recognition for the amount of premiums paid for the children's health insurance.

"The weekly cost of health insurance premiums for the child(ren) should be added to the basis obligation whenever either parent actually incurs the premium expense or a portion of such expense." Child Supp. G. 3(E)(2). The Indiana Child Support Guidelines require that the custodial parent bear the cost of uninsured health care expenses up to 6% of the basic child support obligation. Child Supp. G. 4(H). Any costs that exceed this amount should be apportioned between the parties according to their "Percentage Share of Income," which is computed from the Child Support Worksheet. *Id*.

Here, pursuant to an Agreed Entry, approved by the trial court on February 25, 2004, the parties agreed that Mother would be responsible for providing health insurance for the children as the parties agreed that Mother's current husband "shall keep the children insured for health/accident incidents through said husband's employer." *Appellee's App*. at 33. Mother was to be responsible for the first $586.56 of annual uninsured medical costs for the children, and the parties would share the additional costs with Father paying 75% and Mother paying 25%. *Id*. In a subsequent modification order dated April 11, 2005, the trial court ordered Mother to pay the first $646.00 in annual uninsured medical costs, with Father being responsible for 62% and Mother for 38% of any further costs. *Appellant's App*. at 39-42. This order was made retroactive to September 3, 2004. *Id*. at 38. The current modification petition was filed on May 10, 2007, and at the hearing on this petition, Mother submitted a summary of the uninsured medical costs paid by her since 2004, which totaled $8,974.72.

*Appellee's App*. at 44-47. In its order, the trial court ordered Father to pay $6,731.04, which was 75% of the total amount. *Appellant's App*. at 17.

We conclude that the trial court incorrectly calculated the amount of uninsured medical costs owed by Father. Any uncovered medical costs accrued from February 25, 2004, the date of the first order regarding uninsured medical costs, until September 3, 2004, the date when the April 11, 2005 modification order took effect, should have been paid as follows: Mother was responsible for the first $586.56 of the costs and the parties should have shared any additional costs with Father paying 75% and Mother paying 25%. As to any uncovered medical costs accruing from September 3, 2004 until May 11, 2007 Mother should have been responsible for the first $646.00 of the annual costs, and the parties should have been responsible for any additional costs with Father paying 62% and Mother paying 38%. Additionally, it appears that any future uncovered medical expenses accruing after May 11, 2007 should be paid according to the new uninsured health care expense calculation reflected in the trial court's child support calculation prepared pursuant to its September 24, 2007 order. Further, Mother should be given credit for the health insurance premiums paid on behalf of the children by her current husband as these were actually incurred costs that would otherwise have been available to Mother's household, and under the Indiana Child Support Guidelines, the parent who pays that cost should be given a credit toward his or her support obligation. Child Supp. G. 3(E), cmt. 2.

We remand this case to the trial court to enter an order containing: (1) a proper determination of Father's credit for his prior born child; (2) findings as to whether Mother was voluntarily unemployed and a proper calculation as to her imputed income; and (3)

correct calculations of Father's share of the uncovered medical costs and a proper determination of Mother's credit for insurance premiums paid. Therefore, we vacate the trial court's modification order and remand for proceedings consistent with this opinion.

Vacated and remanded with instructions.

FRIEDLANDER, J., and BAILEY, J., concur.